Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

Joshua L. Gordon
(Counsel of Record)
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

J. P. Nadeau
Nadeau Prof. Office
507 State St.
Portsmouth, NH 03801
(603) 436-0110

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QUESTION PRESENTED

Does a condition of probation providing that a probation officer can conduct searches with no individualized suspicion violate the Fourth Amendment's guarantee against unreasonable searches?

PARTIES TO THE PROCEEDING

Zeta Chi Fraternity is a fraternal organization incorporated in the State of New Hampshire. Zeta Chi Fraternity has no parent or subsidiary corporations.

As this was a criminal proceeding, the State of New Hampshire was the prosecuting party.

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PETITION FOR A WRIT OF CERTIORARI

Zeta Chi Fraternity respectfully petitions for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case.

REPORT OF OPINION BELOW

On May 22, 1997, the New Hampshire Supreme Court rendered an opinion in this case. *State of New Hampshire v. Zeta Chi Fraternity*, __ N.H. __, __ A.2d __ (1997). It is reprinted in the Appendix hereto. The issues for which the petitioner requests certiorari are contained in section III of the opinion and in the dissent, and relevant facts are stated throughout.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION

The United States Constitution, Amendment IV, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Zeta Chi Fraternity is a fraternal organization on the campus of the University of New Hampshire in Durham, New Hampshire. As with most fraternities, it holds an annual "rush" to attract new members.

In February 1994, to attract people to its rush, Zeta Chi invited two female strippers to dance. Some of those attending the rush gave the strippers money. Toward the end of the evening, an act of oral sex was performed on one of the women. After a jury found the fraternity guilty of prostitution, the New Hampshire Supreme Court affirmed the conviction.

In addition, the fraternity had decided not to provide alcoholic beverages to its guests. But the New Hampshire Supreme Court found that because there was a vending machine containing cans of beer accessible to those attending, including those younger than the state's drinking age, that the fraternity had control over the premises, and that an underage person bought beer, the fraternity was guilty of illegal sale of alcohol.

The fraternity's sentence included, among other things, a prohibition against alcoholic beverages on its premises, and a term of probation, which is administered in New Hampshire by the Department of Corrections. In addition, the sentence contained the condition that:

> the defendant's premises shall be subject to unannounced searches by the Department of Corrections . . . to determine compliance with . . . any condition of probation.[1]

State v. Zeta Chi Fraternity, Appendix at 13.

The defendant argued that because the probation condition authorized searches without any need for an individualized belief that contraband existed on the defendant's premises, the search condition violated the Fourteenth Amendment to the United States Constitution. The defendant's argument was based on *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987), which requires "reasonable grounds" to search a probationer's premises. The New Hampshire Supreme Court, however, over a reasoned dissent, found that:

> when a condition of probation authorizes random warrantless searches and the condition is reasonably related to the supervision and rehabilitation of the probationer, a warrantless probation search is constitutionally permissible.

State v. Zeta Chi Fraternity, Appendix at 17, (citing *Griffin v. Wisconsin*, 483 U.S. at 880).

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[1]The sentence initially authorized searches by the police as well, but the New Hampshire Supreme Court ruled the search condition is enforceable by the Department of Corrections only. *State v. Zeta Chi Fraternity*, Appendix at 21.

REASONS FOR GRANTING WRIT

The law is unsettled regarding whether a warrantless search of a probationer pursuant to a condition of probation requires individualized cause to believe the probationer is violating probation. *See, e.g., State v. Perbix*, 331 N.W.2d 14, 19 (N.D. 1983), *later app.*, 349 N.W.2d 403 (1984) ("respectable and well-reasoned authorities have reached contrary results concerning the constitutional validity and application of search provisions" imposed on probationers); *State v. Morgan*, 295 N.W.2d 285, 287 (Neb. 1980) ("respectable and well-reasoned authorities exist on both sides of the question").

The cases, decided in numerous jurisdictions, fall into three general categories. Some courts have found that probation search conditions are facially invalid. On the other extreme, some courts have found that search conditions are either a valid prior consent to search, or that probationers' diminished Fourth Amendment rights do not protect them against searches by their probation officers.

Many jurisdictions have chosen a "middle ground approach." *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997). They have found that while probationers enjoy less Fourth Amendment protection than other citizens, or that Fourth Amendment rights are waived by accepting terms of probation, the search must be based upon some individualized grounds for believing that the probationer is in violation of probation. These courts differ among themselves in the measure of cause required to trigger a warrantless search. Some courts forbid a search without full probable cause, while others allow a search to go forward based on a reasonable suspicion, reasonable grounds, a likelihood, a well-founded suspicion, or some other similar formulation.

Most courts that have reached this middle ground in the last

few years have assumed that the question is settled by *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987). *See, e.g., United States v. Davis*, 932 F.2d 752 (9th Cir. 1991); *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990); *United States v. Schoenrock*, 868 F.2d 289 (8th Cir. 1989) ("*Griffin* stands for the proposition that reasonableness for probationary searches may be established by statute, rather than by warrant."); *United States v. Scott*, 945 F. Supp. 205 (D.S.D. 1996). In *Griffin*, this Court held that a search condition imposed on all probationers by state regulation was valid provided that the search is based upon reasonable suspicion that it might produce evidence of a probation violation. In *Commonwealth v. LaFrance*, 525 N.E.2d 379, 380 (Mass. 1988), the Massachusetts Supreme Judicial Court found that *Griffin* holds:

> "[T]he Fourth Amendment to the constitution of the United States forbids the search of a probationer or her premises unless the probation officer has at least a reasonable suspicion that a search might produce evidence of a wrongdoing."

I. Decisions of Various Federal Circuit Courts Differ with the United States Supreme Court, and the Various Federal Circuit Courts Differ Among Themselves

No Circuit Court has held that a probation search condition is facially invalid.

The 11th Circuit expressly rejected the need for particularized suspicion to search a probationer. *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982), *reh'g. denied*, 697 F.2d 1094 (1983). The 4th Circuit has found that no individualized suspicion is required for a state program requiring convicted felons to yield a blood sample, *Jones v. Murray*, 962 F.2d 302 (4th Cir.), *cert. denied*, 506 U.S. 977 (1992), thus indicating that

it might find similarly in the probation context.

Seven Circuits have taken the middle-ground position set out in *Griffin* and found that probation searches require some level of individualized cause. *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990) (requiring reasonable suspicion, based on *Griffin*); *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992) (parole case, requiring reasonable suspicion, based on *Griffin*); *United States v. Martin*, 25 F.3d 293 (6th Cir. 1994) (search held valid in light of substantial showing of individualized suspicion); *United States v. Coleman*, 22 F.3d 126 (7th Cir. 1994) (case from Wisconsin, directly controlled by *Griffin*); *United States v. Schoenrock*, 868 F.2d 289 (8th Cir. 1989) (requiring reasonable suspicion, based on *Griffin*) (*but c.f., United States v Sharp*, 931 F.2d 1310 (8th Cir. 1991) (upholding search without discussion of particularized suspicion)); *United States v. McCarty*, 82 F.3d 943 (10th Cir. 1996). The 9th Circuit first decided the issue in 1975 and has reaffirmed its position several times. *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975) (requiring "reasonable belief"); *United States v. Gordon*, 540 F.2d 452 (9th Cir. 1976); *United States v. Jeffers*, 573 F.2d 1074 (9th Cir. 1978); *United States v. Dally*, 606 F.2d 861 (9th Cir. 1979); *United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983) (there must be some conduct reasonably suggestive of criminal activity to trigger the search); *United States v. Harper*, 928 F.2d 894 (9th Cir. 1991) (requiring probable cause); *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991); *United States v. Watts*, 67 F.3d 790 (9th Cir. 1995) (not resolving level of suspicion required to allow warrantless search), *reh'g denied*, 79 F.3d 768, *cert. denied*, 116 S. Ct. 1369 (1996).

It is thus apparent that the circuit courts differ on the issue, and that some differ with this Court's holding in *Griffin*. Accordingly, this Court should grant certiorari.

II. The Decision of the New Hampshire Supreme Court Differs with a Decision of the United States Supreme Court and with a Decision of the 1st Circuit Court of Appeals

Griffin held that the Fourth Amendment requires a probation officer have a reasonable suspicion that a search might produce evidence of a probation violation. *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987); *Commonwealth v. LaFrance*, 525 N.E.2d 379, 380 (Mass. 1988).

The 1st Circuit seconded *Griffin*'s holding. In *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990), the court held that, based on *Griffin*, reasonable suspicion was necessary to carry out a search based on a condition of probation.

The New Hampshire Supreme Court, however, in its decision below held that:

> "[I]n order for a warrantless probation search condition to be constitutional it must be related to the rehabilitation or supervision of the defendant, and the search itself must be conducted in a manner that is reasonable in time, scope, and frequency."

State v. Zeta Chi Fraternity, Appendix at 20. The court rejected, however, the notion that there be any individualized suspicion. *Id.*, at 17. The New Hampshire court prescribed two reasonableness standards: 1) the connection between the search condition and the crime committed, and 2) the conduct of the search. However, *Griffin* mandates that the grounds upon which a search is based must also be reasonable. Thus, the New Hampshire court both misunderstands and mis-cites *Griffin*.

Because the decision of the New Hampshire Supreme Court differs with a decision of the United States Supreme Court, and with a decision of the 1st Circuit Court of Appeals, this Court should grant certiorari.

III. Decisions of the Highest Courts in Various States Differ from the Decisions of the Highest Courts in Various Other States

Three states have taken the position that a probation condition waiving Fourth Amendment rights is facially invalid. New York — *People v. Sztuk*, 511 N.Y.S.2d 720 (App. Div. 1987) ("It is improper to require a defendant to waive his constitutional rights against unlawful search as a condition of probation."); *People v. Braun*, 578 N.Y.S.2d 2 (App. Div. 1991); *see also People v. Suttell*, 492 N.Y.S.2d 192 (App. Div. 1985) (probation officer must get a prior judicial determination of reasonable cause); *but c.f.*, *People v. Fortunato*, 376 N.Y.S.2d 723(App. Div. 1975) (search upheld upon showing of cause);. Texas — *Basaldua v. State*, 558 S.W.2d 2 (Tex. Crim. App. 1977); *Tamez v. State*, 534 S.W.2d 686 (Tex. Crim. App. 1976). Florida[2] — *Kirkpatrick v. State*, 412 So. 2d 903, (Fla. App. 1982) (finding search condition facially invalid); *Dearth v. State*, 390 So. 2d 108 (Fla. App. 1980); *Grubbs v. State*, 373 So. 2d 905, 910 (Fla. 1979) ("probationary status may be used as a factor to establish probable cause"); *Isaacs v. State*, 351 So. 2d 359 (Fla. App. 1977); *Pace v. State*, 350 So. 2d 1075 (Fla. App. 1977); *Sanders v. State*, 351 So. 2d 361 (Fla. App. 1977); *Pace v. State*, 335 So. 2d 11 (Fla. App. 1976).

Fourteen states, including New Hampshire, have taken the other extreme and found that the probationer may either waive Fourth Amendment rights, or that the probation condition acts as a prior consent to search. Alaska — *Milton v. State*, 879 P.2d 1031 (Alaska 1994) (affirming *Roman* for probationers);

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[2]Florida has wavered in its attitude toward the issue. The older and the most recent cases indicate distaste for probation search conditions, while the cases in between appear to countenance them upon a sufficient showing.

Roman v. State, 570 P.2d 1235 (Alaska 1977) (parolee search, no cause need be shown). Arizona — *State v. Jeffers*, 568 P.2d 1090 (Ariz. 1977); *State v. Montgomery*, 566 P.2d 1329, 1331 (Ariz. 1977); *State v. Turner*, 688 P.2d 1030 (Ariz. Ct. App. 1984); *State v. Goettel*, 572 P.2d 115 (Ariz. Ct. App. 1977). California — *People v. Bravo*, 738 P.2d 336 (Cal.), *cert. denied*, 485 U.S. 904 (1988) (expressly rejecting necessity for particularized suspicion); *Police v. Lilienthal*, 587 P.2d 706 (Cal. 1978); *People v. Mason*, 488 P.2d 630 (Cal.) (condition was valid prior consent), *cert. denied*, 405 U.S. 1016 (1971). Georgia — *Allen v. State*, 369 S.E.2d 909 (Ga. 1988); *Luke v. State*, 344 S.E.2d 452 (Ga. 1986). Idaho —; *State v. Josephson*, 867 P.2d 993 (Idaho Ct. App. 1993); *but c.f., Idaho v. Pincon*, 657 P.2d 1095 (Idaho Ct. App. 1983) (allowing search upon reasonable grounds). Maine — *State v. Collins*, 681 A.2d 1168 (Me. 1996); *State v. Bernier*, 486 A.2d 147 (Me. 1985) (validity of condition affirmed by equally divided court). Michigan — *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990) (explicitly overturning *Peterson*); *People v. Peterson*, 233 N.W.2d 250 (Mich. 1975) (pointing out that consent to waiver is coercive). New Hampshire — *State v. Zeta Chi Fraternity*, __ A.2d __ (N.H. 1997). New Jersey — *State v. Bollinger*, 405 A.2d 432, 438 (N.J. Super. Ct. App. Div. 1979). New Mexico — *State v. Gallagher*, 675 P.2d 429 (N.M. Ct. App. 1984). North Carolina — *State v. White*, 142 S.E.2d 153 (N.C. 1965); *State v. Mitchell*, 207 S.E.2d 263 (N.C. 1974) (valid waiver of Fourth Amendment rights); *State v. Moore*, 247 S.E.2d 250 (N.C. 1978); *State v. Grant*, 252 S.E.2d 98 (N.C. 1979) (search condition struck down, but change in policy brought about by statute). North Dakota — *State v. Perbix*, 331 N.W.2d 14 (N.D. 1983), *same case*, 349 N.W.2d 403; *State v. Schlosser*, 202 N.W.2d 136 (N.D. 1972). Oregon — *State v. Davis*, 891 P.2d 1373 (Or. App. 1995); *State v. Age*, 590 P.2d 759 (Or. App. 1979); *State v. Fisher*, 574 P.2d 354(Or. App.

1978); *State v. Culbertson*, 563 P.2d 1224 (Or. App. 1977). South Dakota — *State v. Cummings*, 262 N.W.2d 56, 61 (S.D. 1978).

Eleven states have taken the middle ground, as this Court took in *Griffin*, and have required that some measure of individualized suspicion is necessary before conducting a search pursuant to a probation condition. Arkansas — *Wilson v. State*, 752 S.W.2d 46 (Ark. 1988) (reasonable cause). Colorado — *People v. Anderson*, 536 P.2d 302 (Colo. 1975) (reasonable grounds). Hawaii — *State v. Fields*, 686 P.2d 1379, 1389 (Haw. 1984) (probation officer must "point to specific and articulable facts giving rise to a reasonable suspicion that [contraband] are concealed on the person, in the property, or at the place of residence of the probationer"). Illinois — *People v. Eiland*, 576 N.E.2d 1185 (Ill. App. 1991) (must be a likelihood that there will be contraband on premises, based on *Griffin*). Massachusetts — *Commonwealth v. La France*, 525 N.E.2d 379 (Mass. 1988) (reasonable suspicion, based on *Griffin)*. Montana — *State v. Burchett*, 921 P.2d 854 (Mont. 1996); *State v. Burke*, 766 P.2d 254, 256 (Mont. 1988) (reasonable cause); *State v. Fogarty*, 610 P.2d 140, 150 (Mont. 1980) (reasonable basis). Nebraska — *State v. Sievers*, 511 N.W.2d 205 (Neb. 1994); *State v. Finnegan* 439 N.W.2d 496(Neb. 1989); *State v. Morgan*, 295 N.W.2d 285 (Neb. 1980). Nevada — *Seim v. State*, 590 P.2d 1152 (Nev. 1979) (reasonable grounds). Pennsylvania — *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997) (parolee search, requiring reasonable suspicion). Utah — *State v. Martinez*, 811 P.2d 205, 209 (Utah App. 1991) (reasonable suspicion). Washington — *State v. Lucas*, 783 P.2d 121 (Wash. App. 1989) (well-founded suspicion), *review denied* 790 P.2d 167 (Wash. 1990); *State v. Patterson*, 752 P.2d 945 (Wash. App. 1988).

IV. The Question Presented is Important to Criminal Courts Throughout the Country

Probationers retain Fourth Amendment rights. *Morrisey v. Brewer*, 408 U.S. 471 (1972). Yet it is clear that their rights are not as great as other citizens. *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987). The scope of probationers' rights touches each state and every criminal court in the country. As jails become more crowded, and courts look for non-incarceration methods to punish crime and curtail recidivism, probation and similar tools have become increasingly common. This Court should grant a writ of certiorari in this case to determine under what circumstances probationers' homes may be searched, and to settle this important and currently chaotic question of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

Joshua L. Gordon
(Counsel of Record)
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

J. P. Nadeau
Nadeau Prof. Office
507 State St.
Portsmouth, NH 03801
(603) 436-0110